

## Will we face changes of approaches to vertical restraints

(from the Volume Editor)

### ARTICLES

Marta Banaś, Mikołaj Piaskowski, **From the judgment in the *Pierre Fabre* case to the decision in the *Guess* case. An attempt to define the status quo regarding restraints related to online distribution while waiting for the results of the review of vertical block exemptions**

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**Summary:** Alongside the popularity growth of selective distribution systems, the evaluation of the admissibility and risks related to restrictions, especially in the Internet, imposed by suppliers onto distributors becomes more of a current issue. This paper analyses the approach to this problem expressed by competition authorities and courts starting from the *Pierre Fabre* case and to the most recent *Guess* case. It also aims to show the key issues that should be considered within the consultation process conducted by the Commission related to Regulation 330/2010 and the related Guidelines.

**Key words:** *Asics*; *Coty*; *Guess*; selective distribution; restrictions by object; *Pierre Fabre*; platforms; block exemption.

**JEL:** K21

Wojciech Łyszczarz, **Distribution models of electronic contents on the example of e-books**

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**Summary:** E-books can be distributed via Internet platforms according to two principal models. On one hand, a wholesale model can be applied, where e-books are sold to retailers at a wholesale price for further re-sale, the retail prices of which are freely set by the retailers. On the other hand, an agency model can be used, where the retailer acts as an intermediary in e-book sales and charges a commission from the publisher. Experiences of the US and European competition authorities show that application or change of the distribution model can have negative consequences in the area of competition law. This article presents the question of e-book distribution on the example of Apple and the world's largest publisher of e-books.

**Key words:** agent; retail price; agency model; distribution models; competition law.

**JEL:** K21

Fabian Elżanowski, **Online sale restrictions in franchising agreements**

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- I. Introduction
- II. The economic nature of franchising
- III. Ancillary restraints doctrine as a tool of assessment of franchising agreements
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**Summary:** The rules applicable to franchising agreements under EU competition law are the main focus of this article. This publication elaborates on the economic nature of franchise distribution systems and the regulatory framework in place. The application of the ancillary

restraints doctrine to franchising agreements is reviewed. The article outlines recommended changes to EU competition policy with respect to restrictions on online sale in franchise distribution systems.

**Key words:** franchising; franchising agreements; vertical restraints; online distribution.

**JEL:** K21

Joanna Kruk-Kubarska, **Distribution agreements in the EU: restrictions of competition in IPR clauses**

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**Summary:** The paper discusses typical contractual clauses related to IPR that appear in distribution contracts in the European Union, and which might amount to a restriction of competition. The paper covers, among others, the accepted method of analysis of, applicable in parallel, national regulations concerning IPR and EU competition law, as well as the conditions for the exemption from the prohibition of competition restricting agreements. The aim of the paper is to present these issues in the light of the decisional practice of the European Commission and the jurisprudence of EU courts.

**Key words:** anticompetitive clauses; exclusive nature of IPR; special object of protection by IPR.

**JEL:** K21

Magdalena Kowalczyk-Szymańska, **Pre-contractual disclosure obligation in a franchise agreement. Comparative legal analysis based on Polish legislation and selected jurisdictions**

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#### IV. Summary

**Summary:** The article focuses on the presentation of the issue of pre-contractual disclosure obligation in franchisor – franchisee relations and distribution systems based on a franchise agreement. The author presents not only the approach to this subject matter under Polish law, but also the regulations in force in other jurisdictions, both in Europe and worldwide. The analysis of different national legislation, sometimes also at the domestic level (United States of America), makes it possible to assess which of the models seems to be the most suitable for the principle of fair play in business, balancing the interests of both parties of the franchise relationship.

**Key words:** franchise agreement; pre-contractual disclosure; franchise as a distribution system; foreign franchisor.

**JEL:** K12; K21

Olga Szejnert-Roszak, **Termination of a distribution agreement**

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**Summary:** The subject of the article is to analyze the issue of the possibility and mode of termination of a distribution agreement concluded under Polish law, which is an unnamed contract in the meaning of Polish civil law. Distribution agreements, often concluded in an informal manner, do not provide for reasons for their termination, either by notice or immediately. However, their termination

is possible, although it is disputable in Polish literature, for example, whether a distribution contract concluded for an definite term can be terminated upon notice before the expiry of the period for which it was concluded, and whether the general provisions of the Polish Civil Code provide for the possibility of immediate termination of a distribution contract, and in particular – whether it is possible to withdraw from such a contract.

The article contains references to European jurisdictions regarding reasonable termination notice of a distribution agreement and the grounds on the basis of which such notice should be given. It also notes the impact of the *Draft Common Frame of Reference* on shaping the rights and obligations of the parties to a distribution agreement.

**Key words:** distribution agreement; distribution contract; termination of the distribution agreement; reasonable termination notice.

**JEL:** K12; K21

### Eliza Iwaniszyn, **Joint selling groups as a potential counterweight of purchasing power of joint purchasing groups**

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- V. Concluding remarks

**Summary:** Joint selling agreements (alliances) remain one of the least popular topics in antitrust literature. As a rule, they are acceptable under current regulations, however their practical application is subject to numerous restrictions and concerns. This article is an attempt to take up on a rather difficult legal subject matter which, in the era of progressive consolidation of entrepreneurs, may have considerable practical significance. The article includes, first of all, a quick look at the regulation of purchasing and sales groups from the United States, EU and Polish perspective. Secondly, it presents the areas of the largest antitrust risks and opportunities for potential circumstances in which it is worth undertaking the in-depth analysis of the conclusion of joint selling agreements.

**Key words:** joint selling agreements; strategic alliances; purchasing groups; horizontal agreements; joint selling; joint distribution.

**JEL:** K21

## CASE LAW REVIEWS

Jan Polański, **On the analytical framework of ‘by object’ infringements. A comment on the 30 August 2018 ruling of the Court of Appeals in Warsaw, case VII AGa 1114/18 (Ski Team)**

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**Summary:** The article constitutes a critical comment on a ruling delivered by the Court of Appeals in Warsaw. In the ruling, the court disagreed with the position presented by the Polish Competition Authority according to which setting resale prices (RPM) in the case investigated by the Polish NCA amounted to an infringement ‘by object’ under Polish law. In its judgement, the Court of Appeals referred to EU case law and attempted to re-create the analytical framework used by EU courts to establish ‘by object’ infringements. The analysis conducted by the Court of Appeals may, however, raise doubts in the context of its actual conformity with EU law.

**Key words:** RPM; resale price; vertical agreements; anticompetitive object; anticompetitive effect.

**JEL:** K21

Antonina Falandysz-Zięcik, **Bid rigging – a practical review of risks. Judgment of the Court of Competition and Consumers Protection of 8 November 2018, ref. XVII AmA 26/16**

Anna Źochowska-Sychowicz, **Moment of initiation of antitrust proceeding – the moment of issuing or the moment of delivering a statement on initiating the proceeding? Judgment of the Court of Competition and Consumers Protection of 6 June 2018, ref. XVII AmA 48/15**

## BOOK REVIEW

Frank Wijckmans, Filip Tuytschaever, Agata Jurkowska-Gomułka, Małgorzata Modzelewska de Raad, Olga Szejnert-Roszak, **Porozumienia dystrybucyjne w prawie konkurencji. Unia Europejska-Polska [Distribution agreements in competition law. European Union-Poland], Warszawa 2018 (Agata Jurkowska-Gomułka)**

**REPORTS**

**VII Convegno Antitrust di Trento, Trident (Italy), 11–13 April 2019 (Grzegorz Materna)**

**Seminar ‘Aiding and abetting as a special form of participation in antitrust agreements – in light of EU and Polish law’, INP PAN, Warsaw, 3 April 2019 (Artur Szmigielski)**

**Contents, Summaries and Key Words**